

A Brief Worth Writing

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When the law of a defendant’s home state on punitive damages materially favors the defendant, providing a well-crafted argument for its application can change everything.

Punitive Damages— Which State’s Law Applies?

Eye-popping damages awards in personal injury actions against pharmaceutical and medical device manufacturers are becoming all too common. Jury awards in the tens of millions of dollars have become almost routine—and

every month seems to bring at least one nine-figure jury verdict in these cases. Punitive damages make up the biggest component of such awards by far. With manufacturers facing thousands of these suits and the very real possibility of punitive damages awards for each individual case brought to trial, the question of which state’s punitive damages law will apply can be of paramount importance. Will it be the law of the state in which the plaintiff brought the case, or the law of the defendant’s home state?

Under the choice-of-law doctrine of *dépeçage* (which means “carving up”), the laws of different states may be applied to different substantive issues in the case. So while the law of a plaintiff’s home state will typically govern the causes of action, an out-of-state defendant can often make the argument that the law of its home state should govern punitive damages. In most cases, a plaintiff will have used the product (and received any accompanying warnings) in his or her home state and

will likely have been injured and treated for his or her injuries there. But the punitive damages allegations will center on conduct by the defendant at its principal place of business. Those allegations generally implicate corporate decisions and actions related to the design, manufacture, and marketing of the defendant’s product. When a defendant is from out of state, then the decisions and actions that the plaintiff is challenging likely occurred in the defendant’s home state, not the plaintiff’s.

Choice-of-law analyses can be complicated, thorny affairs, and judges are not always receptive to them. The upside to a favorable ruling for a defendant on which state’s punitive damages law applies, however, can completely change the litigation landscape. For drug and device companies, the outcome of each individual case can have far-reaching implications. One big verdict can generate millions of dollars in ads by plaintiff firms and result in huge increases in their inventories of cases.



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Differences in Punitive Damages Laws in Different Jurisdictions

The availability of punitive damages can vary dramatically from one jurisdiction to the next. Michigan, Nebraska, Washington, and Puerto Rico bar punitive or exemplary damages altogether. *E.g.*, *McAuley v. Gen. Motors Corp.*, 457 Mich. 513, 520, 578 N.W.2d 282, 285 (Mich. 1998) (“punitive sanctions may not be imposed,” with a few statutory exceptions not relevant here); *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 857, 443 N.W.2d 566, 574 (Neb. 1989) (“[P]unitive, vindictive, or exemplary damages contravene Neb. Const. art. VII, §5, and thus are not allowed in this jurisdiction.”); *Cruz v. Molina*, 788 F. Supp. 122, 128 (D.P.R. 1992) (“Puerto Rico law does not sanction punitive damages.”); *Dailey v. N. Cost Life Ins. Co.*, 919 P.2d 589, 590 (Wash. 1996) (en banc) (punitive damages are contrary to public policy and prohibited without express legislative authorization).

Other jurisdictions allow punitive damages, but keep awards in check by capping the amount of punitive damages allowed. Punitive damages awards in New Jersey may not exceed five times the defendant’s liability for compensatory damages, or \$350,000, whichever is greater. N.J. Stat. Ann. §2A:15-5.14(b). Ohio limits punitive damages that may be awarded against a defendant in specified personal injury actions to two times the compensatory damages awarded against that defendant. Ohio Rev. Code Ann. §2315.21(D)(2)(a). Alabama caps punitive damages in physical injury cases (except for actions for wrongful death or intentional infliction of physical injury) to the greater of three times the compensatory damages or \$1,500,000. Ala. Code Ann. §6-11-21. Texas limits punitive damages to the greater of (1) two times the amount of the economic damages plus the non-economic damages award, not to exceed \$750,000; or (2) \$200,000. Tex. Civ. Prac. & Rem. Code Ann. §41.008.

Other states, including Pennsylvania, Missouri, California, and New York, give juries free rein over punitive damages. Philadelphia juries have awarded numerous verdicts in the tens of millions of dollars over the last year. A St. Louis jury recently awarded a single plaintiff more than \$100 million. A California jury

awarded over \$400 million in a single-plaintiff case last year, although the judge overturned it posttrial as insufficiently supported by the evidence. Several years ago, a jury in a bellwether trial in a multidistrict litigation memorably delivered a \$9 billion verdict against two defendants in favor of a single New York plaintiff. The judge slashed the verdict to \$37 million posttrial, noting that the ratio of compensatory-to-punitive damages was 1 to 5,524 for one defendant and 1 to 8,136 for the other. But the only check was the judge’s determination that the award was excessive in light of the constitutional limits imposed by the Supreme Court. *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

Advocating for Applying a Defendant’s Home State’s Law to Punitive Damages

Given the scale of these awards, corporate defendants sued in “judicial hellholes” may have a strong interest in the application of the punitive damages law of their home states. To succeed, a defendant will have to walk a court through what is typically a complicated choice-of-law analysis and persuade the court that the defendant’s home state has a stronger interest in having its punitive damages law govern the case at hand.

Below is a step-by-step illustration of such an analysis, using the example of a New Jersey defendant sued in a personal injury case in California by a resident plaintiff who alleges that her use of the defendant’s product caused her to develop cancer. She purchased the product in California, used it for many years there, and was diagnosed with and treated for her cancer in California. She alleges that the defendant failed to provide an adequate warning of the increased risk of cancer from use of its product, and the inadequate warning was the proximate cause of her injuries.

The following illustration details how to apply the doctrine of *dépeçage* to advocate for the application of New Jersey punitive damages law, despite the clear applicability of California law to the plaintiff’s failure-

to-warn claim. It then walks through the choice-of-law analysis undertaken by courts in California and many other jurisdictions and explains the interests at stake and how they should be weighed. It also demonstrates how to distinguish potentially problematic cases applying the forum court’s law in lieu of that of the defendant’s home state.

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Step One: Set Up the Choice-of-Law Test

California, similar to many other jurisdictions, applies a flexible “governmental interest” test to determine which law governs in tort cases involving multiple jurisdictions. *Offshore Rental Co., Inc. v. Cont’l Oil Co.*, 22 Cal.3d 157, 161 (Cal. 1978). California follows the doctrine of *dépeçage*, undertaking a separate conflict-of-laws inquiry for each issue in the case. *Washington Mut. Bank, FA v. Super. Ct.*, 24 Cal.4th 906, 920 (Cal. 2001). Under this approach, even though a plaintiff’s underlying claims for compensatory damages may be governed by the laws of his or her home state, a separate determination should be made as to whether the defendant’s home state’s laws govern punitive damages.

Step Two: Walk Through the Choice-of-Law Factors

As in most jurisdictions that apply it, the governmental-interest test in California involves three parts. *Sullivan v. Oracle Corp.*, 51 Cal.4th 1191, 1202, 254 P.3d 237, 245 (Cal. 2011). First, a court determines whether the state laws at issue materially

differ from one another. Second, if there is such a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a "true conflict" exists. Third, if the court finds that there is a true conflict, the court "carefully evaluates and compares the nature and strength of the inter-

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est of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state." The court then "applies the law of the state whose interest would be the more impaired if its law were not applied." *Id.* We now will undertake the analysis for the example involving the New Jersey defendant and the California plaintiff outlined above.

The Two States' Punitive Damages Laws Materially Differ

New Jersey law governing punitive damages materially differs from California law. For example, New Jersey allows punitive damages in tort cases, but it limits punitive awards to the greater of \$350,000 or five times the amount of the compensatory damages award. N.J. Stat. Ann. §2A:15-5.14 subs. (a) and (b). In contrast, California allows punitive damages in

tort cases, but it does not impose statutory limits on punitive damages awards. See Cal. Civ. Code §3294. In a similar vein, under New Jersey law, if a substance is "generally recognized as safe and effective pursuant to conditions established by the federal Food and Drug Administration and applicable regulations," then New Jersey dictates that "[p]unitive damages shall not be awarded," N.J. Stat. Ann. §2A:58C-5(c), a rule that can have significant implications for the analysis in cases involving FDA-approved products. California, in contrast, has no such limitations on punitive damages.

In This Particular Case, There Is a True Conflict

In our example, in the circumstances of this particular case, there is a true conflict. There is a true conflict because New Jersey has a strong, legitimate interest in the application of its punitive damages law. The defendant in our illustration is a New Jersey corporation with its principal place of business in New Jersey. The alleged punitive conduct, if it occurred at all, occurred primarily at its principal place of business in New Jersey, because that is where the defendant made the majority of the decisions concerning the manufacture, marketing, and design of the product at issue. The defendant should provide the court with employee declarations supporting this argument and cite the supporting case law. *E.g., Meng v. Novartis Pharm. Corp.* Nos. L-7670-07MT, L-6027-08MT, 278, 2009 WL 4623715, at *3 (N.J. Super. Nov. 23, 2009) (finding that although plaintiffs alleged that New Jersey defendant failed to inform medical providers in plaintiffs' home states of risks of defendant's drugs, "Plaintiffs' claims stem from Defendant's business activities in New Jersey regarding the marketing, distributing, and selling" of the drug); *Deutsch v. Novartis Pharm. Corp.*, 723 F. Supp. 2d 521, 525 (E.D.N.Y. 2010) (finding that the relevant contacts for punitive damages purposes were corporate-level activities related to drug development and decisions about disclosures, which took place at the defendant's principal place of business in New Jersey, not the plaintiff's use of the defendant's drugs and related contacts in plaintiff's home state).

New Jersey allows punitive damages in tort cases under certain circumstances, but it limits the amount of punitive damages that may be awarded. New Jersey, therefore, has two distinct interests at stake. By allowing punitive damages, New Jersey furthers its interests in punishing defendants and deterring future wrongdoing. *E.g., Lockley v. State of New Jersey Dep't of Corr.*, 828 A.2d 869, 880 (N.J. 2003) ("[T]he purposes underlying punitive damages awards [are] to punish tortfeasors and to deter them and others from similar conduct."). By limiting the situations in which punitive damages may be recovered, as well as the amount of any such recovery, New Jersey furthers its interest in protecting defendants from excessive financial liability. *Rowe v. Hoffman-La Roche, Inc.*, 917 A.2d 767, 772 (N.J. 2007) (the New Jersey Products Liability Act was enacted "to limit the liability of manufacturers").

By allowing punitive damages but limiting them, New Jersey has subordinated its interest in punishing and deterring conduct to its interest in protecting the financial security of resident defendants by preventing excessive liability. *Accord Hurtado v. Super. Ct.*, 11 Cal.3d 574, 585 (Cal. 1974) (by allowing a cause of action for wrongful death but limiting the damages allowed, "Oregon had subordinated its interest in compensating resident survivors... to its interest in protecting the financial security of resident defendants by preventing the imposition of excessive burdens."). Accordingly, New Jersey's primary interest in applying its punitive damages law is to protect its resident defendants from excessive liability.

California has no comparable interest in applying its punitive damages law. Instead, California's interest is in compensating a plaintiff for his or her alleged injuries. See, *e.g., Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711, 734 (Cal. Ct. App. 1972). That interest will be satisfied by applying California law to a plaintiff's underlying product liability claims—not by applying California's punitive damages law.

Moreover, while California no doubt has a legitimate interest in punishing and deterring wrongful conduct occurring in California, it has no comparable

interest with respect to conduct occurring primarily *outside* of California. The “legitimate interests” of plaintiffs’ home states, “after all, are limited to assuring that the plaintiffs are adequately compensated for their injuries and that the proceeds of any award are distributed to the appropriate beneficiaries.” *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 644 F.2d 594, 613 (7th Cir. 1981) (citing *Hurtado*, 11 Cal.3d at 584). Once California plaintiffs are “made whole by recovery of the full measure of compensatory damages to which they are entitled” under California law, California’s interests “are satisfied.” *Id.* See also, e.g., *Meng*, 2009 WL 4623715, at *3 (holding that the state where the plaintiff took the defendant’s drugs and allegedly was injured “bears almost no relationship to the issue of punitive damages”).

Multiple cases applying California’s choice-of-law test support this conclusion. E.g., *Arno v. Club Med Inc.*, 22 F.3d 1464, 1467–68 (9th Cir. 1994) (applying French law prohibiting punitive damages, which prevails in Guadeloupe, where “virtually all of the relevant conduct occurred outside California” and reasoning that Guadeloupe “has an interest in encouraging local industry”); *In re Air Crash Disaster Near Chicago*, 644 F.2d at 625 (explaining that state of defendant’s principal place of business and state where alleged misconduct occurred have “the greatest interest” in application of their punitive damages law). In fact, the California Supreme Court has confirmed that “a jurisdiction ordinarily has ‘the predominant interest’ in regulating conduct that occurs within its borders” and in being able to assure entities operating within its territory “that applicable limitations on liability set forth in the jurisdiction’s law will be available to [them] in the event they are faced with litigation in the future.” *McCann v. Foster Wheeler LLC*, 48 Cal.4th 68, 97–98 (Cal. 2010) (applying Oklahoma law where defendant’s tortious conduct occurred in Oklahoma). See also *Offshore Rental Co.*, 22 Cal.3d at 164 (holding that “Louisiana’s interest in the application of its law to the present case is evident” because “defendant is a Louisiana ‘resident’ whose negligence on its own premises has caused the injury in question”).

Scott v. Ford Motor Co., 224 Cal. App. 4th 1492 (Cal. Ct. App. 2014), is potentially problematic but does not compel a different conclusion in our illustration. *Scott* involved the determination of whether the law of the plaintiff’s home state of California or the defendant’s home state of Michigan governed punitive damages. *Id.* at 1503. The *Scott* court determined that California and Michigan law conflicted because California allowed punitive damages in tort actions, while Michigan law did not. *Id.* at 1503–04. The court’s analysis under the governmental-interest test should be distinguishable in cases involving other states’ punitive damages law, however, because the interests at stake are unlikely to be the same as those considered by the Michigan legislature. The Michigan policy is not based on the type of economic rationale on which punitive damages limitations are generally grounded—such as an interest in protecting defendants from excessive liability. *Id.* at 1505 and n.9. The Michigan legislature based its punitive damages prohibition on its unusual view that civil courts should not be in the business of punishing defendants. *Id.* at 1504–05 (noting the Michigan public policy that “damages awarded by civil courts are appropriate to compensate, but not to punish”). *Id.* at 1504–05. The *Scott* court appropriately determined that the Michigan legislature did not have a legitimate interest in imposing “its particular view of the appropriate role of the courts in adjudicating civil disputes” on the courts of California. *Id.* at 1506. Consequently, the court concluded that no “true” conflict of law existed and applied California’s law of punitive damages. *Id.* at 1508.

Scott is inapposite when a defendant’s state’s rationale for limiting punitive damages is economic. To distinguish such cases, the defendant should demonstrate for the court that the governmental interests at issue are different. In our illustration, New Jersey, unlike Michigan, limits punitive damages for the economic motive of protecting resident defendants from excessive liability. See *Rowe*, 917 A.2d at 772.

As the California Supreme Court has made clear, a state’s interest in protecting resident defendants from excessive

financial burdens is a legitimate interest that must be carefully evaluated to determine if it is in conflict with the law of the forum. *Hurtado*, 11 Cal.3d at 580. If it is, the court must analyze the “comparative impairment” of the interested jurisdictions to identify the law of the state whose interest would be most impaired if its law were not applied. *Washington Mut. Bank*,

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24 Cal.4th at 920. See also, e.g., *Smith v. I-Flow Corp.*, 753 F. Supp. 2d 744, 748–49 (N.D. Ill. 2010) (“[T]he state in which a defendant is domiciled has a considerably stronger policy interest in whether punitive damages are available than the state in which the plaintiff’s injury occurred;” the defendant’s home state’s interest in “regulating the conduct of its corporate citizens far outweigh[s]” the forum state’s “minimal interest” in assessing punitive damages on a nonresident corporation for conduct that occurred outside the forum’s borders).

The California Supreme Court’s conflict-of-laws pronouncements support that New Jersey has a legitimate interest in the application of its punitive damages law. There is, accordingly, a true conflict, requiring the court to proceed to step three of the governmental-interest test.

Which State’s Interest Would Be Impaired More by Subordinating Its Policy to the Other’s?

New Jersey’s interests would be more impaired than California’s if New Jer-

sey's law were not applied. In analyzing the "comparative impairment" of the two states' interests, courts consider the "history and current status of the states' laws" and "the function and purpose of those laws." *Offshore Rental Co.*, 22 Cal.3d at 166. In our example the court's task is not to determine whether the New Jersey rule or the California rule "is the better

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or worthier rule, but rather to decide—in light of the legal question at issue and the relevant state interests at stake—which jurisdiction should be allocated the predominating lawmaking power under the circumstances of the present case." *McCann*, 48 Cal.4th at 97. Among other things, courts consider (1) whether one state's policy is more specific than the other's, and (2) which law would achieve "maximum attainment of underlying purpose" by the competing governmental entities considered together. *Offshore Rental*, 22 Cal.3d at 166.

The purpose of New Jersey's Punitive Damages Act, enacted in 1995, is to balance New Jersey's interest in punishing and deterring a defendant who has engaged in malicious or wanton misconduct with its interest in protecting resident defendants from excessive damages awards. See N.J.

Stat. Ann. §§2A:15-5.10, 2A:15-5.14 (a). A Legislative Sponsor's Statement to Bill 292, a precursor to the Punitive Damages Act, declares that the bill was "intended to limit the use and amount of punitive damages which may be awarded in a lawsuit." *Tarr v. Bob Ciasulli's Mack Auto Mall, Inc.*, 916 A.2d 484, 489 (N.J. Super. Ct. App. Div. 2002) (citing Sponsor's Statement, 206-292, 1st Sess. (N.J. 1994)). The sponsor recognized that "[t]he awarding of punitive damages was originally intended to punish defendants for malicious or wanton actions and to deter others from engaging in similar activities." *Id.* The sponsor expressed concern, however, that damages were being awarded that did not meet the standard, contributing to "the high cost of litigation." *Id.* Accordingly, "[t]he [New Jersey] Legislature's purpose in enacting the Act was to establish more restrictive standards with regard to the awarding of punitive damages." *Pavlova v. Mint Mgmt. Corp.*, 868 A.2d 322, 325 (N.J. Super. Ct. App. Div. 2005).

In contrast to New Jersey's strong, expressly stated interest in capping punitive damages at five times the compensatory award or \$350,000, California has no specific or expressly stated interest in facilitating punitive damages in excess of that ratio. In *Simon v. San Paolo U.S. Holding Co., Inc.*, 35 Cal.4th 1159 (2005), the California Supreme Court reviewed U.S. Supreme Court precedent and recognized that "past decisions and statutory penalties approving ratios of 3 or 4 to 1 were 'instructive' as to the due process norm." *Id.* at 1182 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)). *Simon* further recognized that ratios in excess of single-digits are rarely constitutional but that "[m]ultipliers less than nine or 10 are not, however, presumptively *valid* under *State Farm*." *Id.* (emphasis in original). *Simon* noted, "Especially when the compensatory damages are substantial or already contain a punitive element, lesser ratios 'can reach the outermost limit of the due process guarantee.'" *Id.* (quoting *State Farm*, 538 U.S. at 425). See also *Roby v. McKesson Corp.*, 47 Cal.4th 686, 693 (Cal. 2009) (holding that punitive damages were constitutionally limited to a one-to-one ratio where noneconomic damages were sub-

stantial). Thus, while California law does not specifically cap punitive damages at a 5:1 ratio, such a ratio would be considered very substantial under California law, and it is not as if California law expresses an affirmative desire for punitive awards in the range of 5 to 9 times compensatory damages.

Accordingly, under the "comparative impairment" analysis, New Jersey has the more specifically defined policy, and applying New Jersey law would allow "maximum attainment" of both states' interests. It would respect New Jersey's interest in providing a cap, but the cap is high enough to satisfy California's interest in punishing and deterring conduct warranting punitive damages. In addition to these factors, New Jersey has the much stronger interest over defendants that are citizens of New Jersey, particularly when the conduct allegedly giving rise to punitive damages occurred in New Jersey. Moreover, given the uniform national scope of decisions related to the labeling and distribution of prescription drug products, having the law of the one state in which those decisions were made govern that conduct protects justified expectations and advances the interests of certainty, predictability, and uniformity of result, as well as ease in the determination and application of the law to be applied. Restatement (Second) of Conflicts of Law §6, cmts. d, f, g (1971). For these reasons, New Jersey's interest in regulating activity committed within its borders is greater than any interest California may have in our example.

Conclusion

The choice-of-law analysis can be grueling. To be effective, it requires a thorough understanding and explanation of the competing interests at stake. But in many cases, the benefit of the application of the punitive-damages law of a defendant's home state is hard to overestimate.

When the law of a defendant's home state on punitive damages materially favors the defendant, providing a well-crafted argument for its application can change everything. It can mean the difference between a quick resolution and years of protracted litigation, ending with breathless press reports of a staggering damages award. This is a brief worth writing. 